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IN THE  
**SUPREME COURT OF THE UNITED STATES**  
OCTOBER TERM, 1977

**No. 77-122**

**ROYAL W. SIMS and the R. W. SIMS TRUST,**  
*Petitioners,*

*v.*

**WESTERN STEEL COMPANY,**  
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

**REPLY BRIEF OF PETITIONERS**

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Respondent's opposition obscures the issue that this case presents to the Court. The heated feud between Chief Judge Willis W. Ritter of the U.S. District Court for the District of Utah and various judges on the Tenth Circuit Court of Appeals has created a breakdown in judicial administration in the Tenth Circuit which has in turn served to deny petitioners a fair and impartial hearing on appeal.

The bitter Ritter-Tenth Circuit feud and the problems that this feud has engendered for appellees from Judge Ritter's court are movingly set forth in Judge Ritter's affidavit (Petition Appendix [hereinafter "Pet. App."] at 49a, et seq.). While Judge Ritter's account of the feud and of these problems need not be repeated, it demonstrates why this Court should now intervene.

Respondent's opposition deals largely with the issues of law that were in contention in this case. As petitioners have indicated, petitioners do not seek this Court's review to resolve those issues (although to the extent those issues have been incorrectly decided, the Court of Appeals decision should be vacated). But even as to these issues, respondent has not accurately presented the facts. Two examples make the point:

#### THE RELEASE ISSUE

First, contrary to respondent's contention that Judge Ritter's findings were properly weighed by the appellate court, the Tenth Circuit ignored Judge Ritter's findings of fact and conclusion of law on the critical issue of the release supposedly given the third party infringer (alleged to cover respondent as well). Respondent attempts to support the appellate court's action by arguing that Judge Ritter was wrong as a matter of law in denying respondent the opportunity to amend its pleadings to include the defense of release; respondent says that the Court of Appeals simply "corrected" that error on appeal. (Respondent's Opposition [hereinafter "Res. Opp."] at 12). However, Judge Ritter's decision was based on three separate conclusions of law,<sup>1</sup> none of which was discussed by the Court of Appeals.

<sup>1</sup> Where Defendant fails to plead an affirmative defense based upon release, after having been admonished, more than one year

[footnote continued]

Many courts have denied leave to amend when the moving party knew about the facts on which the amendment was based but omitted them from the original pleadings.<sup>2</sup> In this case, the trial court found that there was no reasonable excuse for respondent's neglect in amending its pleadings, and that to allow amendment on the eve of the trial imposed an "unreasonable burden on the court". Indeed, here respondent virtually invited denial of its motion to amend the pleadings by joining it with an equally belated demand for a jury trial as to the release defense. (Pet. App. at 44a). When the motion to amend was made at trial, petitioners offered to withdraw their opposition to the amendment if respondent would drop the companion demand for a jury trial. (Trial Record [hereinafter "Record"], Vol. 1 at pp. 5, 6). This respondent refused to do. The requirement of a jury trial, raised as it was after a year of litigation and at the eve of trial, was viewed by petitioner — and prop-

prior to trial, by the Court to so amend its pleading, leave will not be granted on the day of trial to add such a defense.

A late request to add an affirmative defense, based upon release, when the party has had knowledge of the affirmative defense two years before the date of trial and before the commencement of the litigation imposes an unreasonable burden upon the Court and the opposing party and refusal to grant leave to so amend the pleadings is within the discretion of the Court.

A two year delayed motion to add an affirmative defense based upon release, coupled with a demand for a jury trial, by a party having knowledge of the defense and having been admonished by the Court more than one year prior to the trial to add the defense, will be denied (Pet. App. at 44a-45a).

<sup>2</sup> E.g., *Head v. Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973); *Troxel Mfg. Co. v. Schwinn Bicycle Co.*, 489 F.2d 968 (6th Cir. 1973), cert. denied, 416 U.S. 939 (1974); *Komie v. Buehler Corp.*, 449 F.2d 644 (9th Cir. 1971); See also, Wright and Miller, *Federal Practice and Procedure*, Civil § 1488 (1971).

erly regarded by the trial court — as an abusive stalling tactic.

Despite the fact that Judge Ritter was seemingly well within his discretion in rejecting respondent's untimely request to amend its pleadings, the Court of Appeals did not even discuss Judge Ritter's conclusions of law with respect to that issue. It simply presumed that Judge Ritter was wrong and proceeded to consider, on its own initiative, the excluded defense of release and the excluded release document.

#### RELEASE DEFENSE SOLE GROUNDS FOR DECISION BELOW

Equally misleading is respondent's suggestion that the Court of Appeals had alternative grounds to deny petitioners' claim for respondent's inducement to infringe petitioners' patent. (Res. Opp. at 11). The Court of Appeals based its decision with respect to this claim *solely* on the improperly considered defense of release. (Pet. App. at 12a). The Court did not hold, as respondent maintains, that "petitioners had failed to establish, as required by 35 U.S.C. §271(b), either that Western actively participated in Rite-Way's alleged infringement of their patent or that Western had acted with the intent to induce an infringement ([Pet. App.] at 10a-11a)." (Res. Opp. at 11). The closest the appeals court came to such a holding was the observation that "the merits of this [inducement to infringe] claim are uncertain and shadowy and *likely* non-existent." (Emphasis added.) (Pet. App. at 11a).

However, the trial court had found the "inducement by Western to infringe Plaintiffs' patent was knowing and willful." (Pet. App. at 41a).<sup>3</sup> Despite the Court

<sup>3</sup> The trial court's Finding of Fact No. 48, in its entirety, is:

The Court finds that the inducement by Western to infringe Plaintiffs' patent was knowing and willful.

[footnote continued]

of Appeals' colorful language, it never set aside the district court's finding of fact as "clearly erroneous" as required by Rule 52, Fed. R. Civ. P. It simply reversed as though it had the discretion of a second trial court.

But the law has been settled by this Court:

It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. \*\*

We are not given those choices, because our mandate is not to set aside findings of fact "unless clearly erroneous." *U.S. v. National Ass'n of Real Estate Boards*, 339 U.S. 485, 495-596 (1950).

Consequently, the Court of Appeals' decision on the inducement to infringe count rested squarely on that court's construction of the release document and of the release defense. Petitioners' contention that the court was procedurally not privileged to consider an unpleaded affirmative defense is therefore dispositive of the case.

#### TENTH CIRCUIT FEUD THREATENS RIGHT TO IMPARTIAL JUSTICE ON APPEAL

While these issues are of obvious importance, they are *not* the key to this case. The fact that the Court of Appeals ignored Judge Ritter's findings of fact is merely

The facts support a finding of intentional infringement by revealing a total disregard for the patent and contractual rights of Plaintiffs. Such a finding is further supported by the fact that Western deliberately withheld the drawings, designs, data, customer lists and specifications from Plaintiffs and deliberately gave that same material to Indiana, the competitor of Plaintiffs, for the known and intended purpose of inducing infringement by Indiana and causing willful harm to Plaintiffs. (Pet. App. at 41a-42a).

illustrative of one of the ways the Court of Appeals has found to discipline a man considered to be a "problem" judge. (See Res. App. at 52a). This case must be heard because through it the Court can deal with a problem affecting not only the petitioners but also the many other litigants who are the unwitting victims of the feud raging in the Tenth Circuit. Since 1970, the year Judge David Lewis, one of Judge Ritter's primary detractors, was appointed Chief Judge of the Tenth Circuit, an incredible 67% of all Judge Ritter's appealed decisions have been reversed. (Pet. at 17). As Judge Ritter himself noted in his sworn affidavit, the feud in the Tenth Circuit seriously threatens the ability of appellees from Judge Ritter's court to get fair and impartial justice on appeal. (Pet. App. at 49a). The Judicial Conference may be able to investigate the problem in the Tenth Circuit, but it cannot afford these petitioners the justice that the Tenth Circuit feud has denied to them. Petitioners are at least entitled to a hearing on appeal before judges who are not bent on disciplining a trial judge by rote reversal of his decisions.

As the supervisor of the federal judiciary, the Court has a duty to resolve problems such as the one in the Tenth Circuit. Petitioners were caught in the crossfire in the Tenth Circuit feud and only this Court can grant relief.

## CONCLUSION

For the foregoing reasons and for the reasons presented in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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